In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1267

THEATRES SERVICE COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND DANCE FREIGHT LINES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. 1a, 278 F. Supp. 7) sustaining the Interstate Commerce Commission's interpretation of appellant's motor carrier certificate and its conclusion that certain shipments transported by appellant are beyond the scope of that certificate.

299-344—68

Appellant, a motor common carrier, is authorized by a certificate of public convenience and necessity to transport, *inter alia:* "magazines, books, and periodicals consigned to or from magazine dealers and distributors," in specified geographic areas (J.S. 26a). On August 27, 1965, appellant filed an application for a certificate which would authorize it to transport magazines, books and periodicals without restriction as to the character of consignor or consignee, between points and over routes which it could already serve.[1] Thereafter, Dance Freight Lines, an appellee herein, filed a formal complaint with the Commission, alleging that appellant had transported eleven specific shipments without authority, because neither the consignor nor the consignee were magazine dealers or distributors. The application and the complaint were consolidated for hearing and decision (J.S. 11a, 105 M.C.C. at 422).

After full administrative proceedings, the hearing examiner held that ordinary commercial usage should control the interpretation of the phrase "magazine dealers and distributors" in the certificate and that, under this standard, the phrase was equivalent in meaning to magazine retailers and wholesalers (J.S. 16a–17a, 105 M.C.C. at 425–26). Since the consignor and consignees involved in the eleven shipments did not qualify, the shipments specified in the complaint were found to exceed the scope of appellant's certifi-

[1] At the same time, appellant filed a petition for interpretation of its existing certificate. At the opening of the hearing, the examiner ruled that this aspect of the consolidated case should be heard first. Appellant withdrew its petition to avoid the necessity of carrying its burden of proof (Tr. 6–12).

cate. The Commission, Division 1, unanimously approved the examiner's report and ordered appellant to cease and desist from the unauthorized shipments (J.S. 8a–9a, 105 M.C.C. 421).

The three-judge district court unanimously sustained the Commission's decision and order (J.S. 1a–7a, 278 F. Supp. 7 (N.D. Ga.)).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The interpretation of a certificate issued by the Commission is primarily a question for that agency, *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 177, and unless its interpretation is clearly erroneous it is binding on the courts, *Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. The district court, upon a careful examination of the administrative record, correctly held that the Commission's interpretation and application of the terms of appellant's certificate of public convenience and necessity were amply justified and in full accord with the facts (J.S. 4a–7a, 278 F. Supp. at 9–11).

1. Appellant's principal contention is that the Commission erroneously refused to give "magazine dealers and distributors" its literal dictionary meaning,[2] and instead interpreted the certificate in the

[2] Appellant contended that the literal definition of "distributor" included both a Board of Education which orders magazines and then places copies in its schools' libraries, and a teacher who collects children's nickels, buys the *Weekly Reader* magazine for her class, and then hands out the copies (Tr. 224–225).

light of ordinary commercial usage. However, as the lower court found, the Commission's reliance upon ordinary commercial usage is in accord with established law (*Interstate Commerce Commission* v. *Black,* 6 Federal Carriers Cases, ¶ 80,466, pp. 2365–2368, affirmed, 167 F. 2d 825, 827–828 (C.A. 5), certiorari denied, 335 U.S. 818 (J.S. 6a, 278 F. Supp. 10)), and appellant has failed to demonstrate any reason why commercial usage is inappropriate in this particular case.

2. The determination of whether the eleven specific shipments consigned by Kingsport Press were beyond the scope of appellant's certificate was primarily a question of fact for the determination of the agency. The Commission was clearly within its discretion in concluding that Kingsport's occasional mailings of publications do not bring it within the term "magazine dealer or distributor," and substantial evidence supports the Commission's further finding that none of the eleven consignees was a magazine dealer or distributor.[3] The lower court having sustained the Commission's determination, there is no occasion for plenary review of this essentially factual issue. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491.

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[3] The Georgia School Book Depository and Allyn & Bacon, Inc., consignees on seven of the eleven shipments, were conceded by appellant to be neither magazine dealers nor distributors (Tr. 30–31, J.S. 4a, 278 F. Supp. at 9). One shipment was consigned to Sister Mary Severine at St. Joseph's High School, and the remaining three to two Baptist Book Stores, which the Commission found were not magazine dealers or distributors within the commercial meaning of the term (Tr. 31, J.S. 5a, 7a, 16a, 17a, 278 F. Supp. at 10–11, 105 M.C.C. at 426).

3. Finally, the Commission was clearly acting within its discretion in considering all the relevant evidence presented in the consolidated application and complaint proceedings,[4] and appellant has not demonstrated that the consolidation of the proceedings in any way prejudiced its interests. Appellant was a party to both proceedings and participated fully therein.[5] In both proceedings, the evidence was directed to the interpretation of appellant's certificate and the permissible scope of operations under that certificate. "In these circumstances it is difficult to see how [appellant] could have sustained substantial prejudice from the Commission's consideration of the evidence upon matters as closely related as those in issue in these two proceedings." *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 528.

Appellant's argument (J.S. 24–36) that the Commission improperly shifted the burden of proof is merely an indirect way of challenging the sufficiency of the evidence on which the Commission based its findings, discussed *supra*. The Commission considered all the evidence adduced during the consolidated hearing and found that it established that Kingsport Press, Inc., was not a "distributor" and that none of the eleven consignees qualified as "dealers" or "distributors." The district court correctly held that

[4] Similar consolidation of I.C.C. proceedings was sustained in *Denver Chicago Transport Co., Inc.* v. *United States*, 183 F. Supp. 785, 786 (D. Colo.), affirmed, *per curiam*, 364 U.S. 627. Cf. *American Trucking Assns.* v. *United States*, 326 U.S. 77, 83.

[5] Indeed, appellant filed a single brief with the Commission in its role as "applicant-defendant" (J.S. 11a, 105 M.C.C. at 423).

these findings were "justified" by the evidence (J.S. 4a–7a, 278 F. Supp. at 9–11).

CONCLUSION

This case presents no substantial issue warranting plenary consideration by this Court. The judgment of the court below should be affirmed.

Respectfully submitted.

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